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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KERRY ENGSTROM, Plaintiff and Respondent, v. JOHN K. GIBA, Defendant and Appellant.	D054228 (Super. Ct. No. 37-2008-00067500-CU-HR-EC)

APPEAL from an order of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

The court granted an injunction under Code of Civil Procedure section 527.6,[1] prohibiting John Giba from harassing or contacting Kerry Engstrom or her young daughters, and ordering Giba to stay 150 yards away from Engstrom's home and workplace, and from the girls' school. Giba appeals, challenging the sufficiency of the evidence to support the order. We affirm.

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1 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

FACTUAL AND PROCEDURAL SUMMARY

Giba and Engstrom each have children that attend the same elementary school. In October 2008, Engstrom filed a petition seeking a protective order against Giba under the civil harassment statute. (§ 527.6.) Engstrom said she felt threatened by Giba because he is a registered sex offender and he invited her eight-year-old daughter S. to come home with him. Engstrom said Giba has "fostered a relationship" with S., "and has gone to her class at school and spoke to her, making her feel uncomfortable."

In an attachment, Engstrom stated that on September 19, 2008, Giba was with S. when Engstrom went to school to pick up her daughter. According to Engstrom, Giba said "[S.] is more than welcome to come to my home anytime." Engstrom explained that she had previously made arrangements with Giba's wife, who volunteers at the school, to accompany S. on her walk home, but when Engstrom met Giba she "felt uneasy" and, shortly after, learned that Giba is a registered sex offender. After that time, Giba approached S. in her classroom, "and has gone out of his way to talk to her."

Two weeks later, the court held a hearing on Engstrom's petition. At the hearing, S. testified that Giba approached her at school and "said 'hello' and he . . . touched my back and said 'I'll catch up with you' and all that stuff." She also said that one day when her mother was picking her up, Giba said to her "when you have something that you can't do, you can go over to my house, you can go over to my house." S. said that Giba has two sons at the school.

S.'s testimony was corroborated by Engstrom and Ed Condon, Engstrom's boyfriend who lives with the family. Condon said he heard Giba inviting S. to come to

Giba's house. Engstrom testified the main reason she was seeking the protective order is to "make sure that [S.] feels safe and protected . . . ."

In opposing the petition, Giba acknowledged he was required to register as a sex offender under Penal Code section 290. He said he "was originally arrested for several counts of child molestation," but the counts were reduced to two counts of violating Penal Code section 647.6, which imposes criminal penalties for any person "who annoys or molests any child under 18 years . . . ." (Pen. Code, § 647.6, subd. (a)(1).)

Giba testified he twice had contact with S. "Once at school when I saw her after I walked home with her and introduced myself to [Condon], . . . and told him that . . . if they had any reason to leave [S.] with my wife and my boys, she's more than welcome to do that." Giba said he walked S. home only a few hundred yards before Engstrom pulled up in her car. On the second occasion, Giba said he saw S. a few days later in his son's classroom, and merely said "[h]ow you doing?"

After considering the evidence, the court granted the petition, stating, "I'm satisfied that [Engstrom's] concerns for [her] daughter are legitimate." The court stated that Giba owed a duty "at least, to approach the mother before you had contact with the daughter. I think [Engstrom's] fears are genuine."

The court then issued an order prohibiting Giba from harassing or contacting Engstrom or her daughters, and staying away from them, and from their home, workplace, vehicles, and school. The order is in effect for three years, until October 15, 2011.

DISCUSSION

On appeal, Giba contends there was "[n]o evidence of harassment" to support the court's imposition of an injunction under section 527.6.

In assessing this claim, we are governed by well established rules of appellate review. "'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Additionally, when considering a claim that the evidence does not support the court's ruling, "[w]e resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value." (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) Even if the evidence at the hearing is subject to more than one reasonable interpretation, we may not reweigh the evidence or choose among alternative permissible inferences. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) If the court's ruling is silent as to a particular factual finding, we are required to imply findings sufficient to support the court's ruling. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.)

Under section 527.6, a court may issue a protective order against a person who has engaged in "harassment." (§ 527.6, subd. (a).) "Harassment" means "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a

specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." (§ 527.6, subd. (b).) "The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (*Ibid.*) "'Credible threat of violence' is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose." (§ 527.6 subd. (b)(2).) "'Course of conduct'" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual . . . ." (§ 527.6, subd. (b)(3).)

The purpose of section 527.6 "'is to prevent future harm to the applicant by ordering the defendant to refrain from doing a particular act.'" (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1266.) Before imposing a protective order, a trial court must find clear and convincing evidence that unlawful harassment exists. (§ 527.6, subd. (d).) If the court determines that a party has met the "clear and convincing" burden, its determination will not be disturbed on appeal without a showing of a clear abuse of discretion. (See *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912; *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2.)

Applying these principles, we find no abuse of discretion in this case. Engstrom presented evidence that Giba engaged in activities specifically directed at S. and made several statements to her that made the child uncomfortable and seriously alarmed her

mother.[2] The family was understandably concerned after a person previously convicted of annoying or molesting a minor and required to register as a sex offender, approached an eight-year-old girl, told her that she is welcome at his house any time, and on another occasion patted her on the back. Engstrom testified that she felt her daughter was in danger and wanted to protect her. On this record, there was evidence supporting that Giba engaged in a course of conduct presenting a potential threat to S.'s safety, and thus a protective order was justified.

In arguing these facts do not support a finding of harassment, Giba contends he did not intend to act improperly toward Engstrom or her daughter, and that he was simply walking his sons home from school when Engstrom saw him with her daughter. The court, however, considered these arguments, and rejected them. The court had a reasonable basis to do so.

First, with respect to intent, the statute does not require a showing of specific intent to harass another person. Instead, the plaintiff must present evidence showing the defendant made a "knowing and willful statement . . . that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family . . . ." (§ 527.6, subd. (b).) Alternatively, a defendant's activities justify a protective order if they constitute a "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." (*Ibid.*) The evidence supported that Giba's statements to S. were knowing and willful and

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[2] Although S. did not specifically state she had been uncomfortable, this fact can be readily inferred from her testimony, and her mother's petition and testimony.

were directed at S., and Giba's conduct would have placed a reasonable person, knowing of Giba's sexual offender registration requirement, in fear of his or her safety and/or seriously alarmed or annoyed a reasonable person.

Additionally, the fact that Giba believes his conduct was proper because he was simply walking home with his sons is insufficient to show the court erred in concluding that a protective order was warranted. In determining whether there is substantial evidence to support the court's order, we must accept as true the evidence supporting the verdict, disregard conflicting evidence, and indulge every legitimate inference to support the verdict. (*Schild v. Rubin*, *supra*, 232 Cal.App.3d at p. 762.) We cannot reweigh the evidence or judge the credibility of the witnesses. (*Ibid*.) The court found that Giba's actions in walking home with S. were not necessarily innocent, and we are bound by this factual finding. The judge had the benefit of observing the witnesses first hand and evaluating the witness demeanor and tone of the testimony. We must defer to the court's factual conclusions that Engstrom had a legitimate reason to be seriously alarmed by Giba's conduct.

Giba's reliance on *People v. Ponce* (2009) 173 Cal.App.4th 378 is misplaced. In *Ponce*, the trial court issued a three-year restraining order against a criminal defendant under Penal Code section 136.2. (*Ponce*, at p. 382.) The reviewing court held the order was improper because Penal Code section 136.2 permits a protective order only for the duration of the criminal proceeding. (*Id.* at p. 383.) Moreover, the court found the order was improperly issued because the moving party presented no evidence that the order was needed and did not even explain the reason for the request. (*Id.* at pp. 384-385.)

This case is different because section 526.7 specifically permits a three-year order, and Engstrom presented evidence and specifically explained the need for the order.

In a separate attachment filed with this court, Giba suggests that the protective order is too broad because both of his sons attend the same school as S., and the order to stay away from the school will prevent him from attending school functions, such as his oldest son's graduation. However, the record shows the court was aware that Giba's sons attend the same school, and nonetheless believed a protective order was necessary. There is nothing in the record showing this conclusion was erroneous. Moreover, to the extent Giba believes it is important to attend certain special school functions (such as a graduation), he is entitled to seek special permission from the court.

DISPOSITION

Order affirmed. Giba to bear Engstrom's costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.